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and as representative of the Estate of Daniel Shaver*

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:

Philip Mitchell Brailsford
Corinne Elizabeth Brailsford

Debtors.

In Proceedings Under Chapter 7

Case No. 2:19-bk-00802-BKM

Adversary Proceeding No.: 2:19-AP-
00171-BKM

**THE SWEET PLAINTIFFS'
RESPONSE TO BRIEF ON
ABSTENTION**

Plaintiffs/Creditors Laney Sweet, for herself and as personal representative of the Estate of her late husband, Daniel Shaver, and as guardian of her minor children, N.S. and E.S. (collectively, the "Sweet Plaintiffs") respectfully submit that this Court is correct to interpret the pending motion for stay relief as a request to invoke the Court's authority to stay and abstain from conducting any further proceedings in Adversary Proceeding No. 2:19-AP-00171-BKM (the "Adversary Proceeding"). As the Sweet Plaintiffs filed The Sweet Plaintiffs' Motion for Withdrawal of the Reference of Adversary Proceeding to Allow Claims to Proceed in District Court Case No. CV-17-00152-PHX-GMS ("Motion for Withdrawal") earlier this same day, the Bankruptcy Court has *sua sponte* powers to stay any further activity in the Adversary

Proceeding until Judge Snow of the District Court has resolved the Motion for Withdrawal of the Reference. If the District Court grants that motion, the claims of the Sweet Plaintiffs that are the subject of the dischargeability issues in the Adversary Proceeding will proceed to final resolution, including through trial, before the District Court in Case No. CV-17-00152-PHX-GMS (the “District Court Lawsuit”), and the Bankruptcy Court would continue the stay of the Adversary Proceeding until final adjudication in the District Court ripens the dischargeability issues for further consideration by this Bankruptcy Court. If the District Court denies the Motion for Withdrawal of the Reference, then the Court may reopen proceedings in the Adversary Proceeding to address how such matters may be resolved by this Court. The failure to grant a stay will manifest all of the judicial inefficiency, unnecessary duplication of judicial effort and party expense, risks of inconsistent rulings, and unjustified confusion and argument over how this Court might administer remaining discovery, pre-trial motions and other pre-trial proceedings for a personal injury-based jury trial this Court has no jurisdiction to hold. So, the Court should exercise its inherent powers to stay the proceedings and abstain until further decision by the District Court.

I. The Pending Motion to Withdraw the Reference.

The Sweet Plaintiffs hereby incorporate all facts and analysis in their recently filed Motion for Withdrawal. The sum of that analysis establishes that the adjudication and liquidation of the willful and malicious injury variants of the wrongful death and constitutional tort (Section 1983) claims that are the subject to the Sweet Plaintiffs’ non-dischargeability arguments in the Adversary Proceeding involve: 1) non-core proceedings; 2) which must be withdrawn per 28 U.S.C. § 157(b)(5) because the Bankruptcy Court may not adjudicate such personal injury and wrongful death claims for which the Sweet Plaintiffs are entitled to a jury trial; and 3) which must also be withdrawn per the mandatory withdrawal terms of 28 U.S.C. § 157(d) because the Section 1983 claims require the Court to assess and analyze complex questions of non-bankruptcy federal law involving a variety of civil rights violations and corresponding qualified immunity defenses. The Motion for Withdrawal further explains why, even if the withdrawal were not mandatory, substantial and compelling cause exists to order

1 withdrawal of the adjudication and liquidation issues under 28 U.S.C. § 157(d). It establishes
2 the judicial efficiency, avoidance of wasteful and unnecessarily confusing duplicative
3 proceedings, promotion of judicial certainty and avoidance of inconsistent outcomes, and
4 efficient and timely resolution of the Sweet Plaintiffs' claims and the defenses of Debtor
5 Defendants Philip Mitchell Brailsford and Corrine Brailsford (the "Debtor Defendants") that
6 will be achieved by allowing the willful and malicious injury variants of the Sweet Plaintiffs'
7 wrongful death and Section 1983 claims against the Debtor Defendants to be joined for trial in
8 the District Court Lawsuit with the Sweet Plaintiffs' overlapping non-willful and malicious
9 variants of those same claims that are currently pending there¹, and with their factually and
10 legally overlapping claims in that lawsuit against the City of Mesa and five other police officer
11 colleagues of Debtor Defendant Philip Mitchell Brailsford who were also involved in the
12 shooting death of Daniel Shaver.

13 Especially critical to the Bankruptcy Court's analysis of the stay/abstention issue is the
14 explanation provided in the Motion for Withdrawal of the Debtor Defendants' substantial
15 participation in disclosure and discovery regarding the Sweet Plaintiffs' claims against them
16 before they filed their bankruptcy proceeding, which included even completed disclosure of
17 expert reports, as well as their participation in dispositive motion briefing early in the case, and
18 their attendance through counsel at the depositions of all the other individual defendants and
19 their experts conducted in just the last two months. [See Doc. 50 (Motion for Withdrawal) at
20 2-3, 5-6]. The Debtor Defendants have taken affirmative positions factually, legally and
21 procedurally in response to the Sweet Plaintiffs' claims, have participated meaningfully already
22 in discovery, and have had the added benefit of observing the parties' fulsome briefing and the
23 District Court's rulings on the other Defendants' summary judgment motions. [See *id.* at 5-6,
24 12-14,15-17]. Reinserting the Debtor Defendants into the existing District Court proceedings –

25
26 ¹ As briefed previously to this Court, and in the Motion for Withdrawal, despite this Court's
27 discharge order and the resulting injunction, the Sweet Plaintiffs are entitled to pursue the non-
28 willful and malicious variants of their wrongful death and Section 1983 claims against the
Debtor Defendants in the District Court Lawsuit solely for the purpose of enforcing such claims
against insurers or indemnitors of the Debtor Defendants, like the City of Mesa and its insurers.
[See Motion for Withdrawal [Doc. 50 at 3-4].

1 even if the Debtor Defendants justify some additional discovery and/or dispositive motion
2 practice for just themselves – would not be difficult. Judge Snow is intimately familiar with
3 the precise facts, testimony and exhibits that underlie the claims against the Debtor Defendants,
4 and has made many substantive and discovery rulings arising from those matters and relating
5 to the Sweet Plaintiffs’ overlapping claims against others. [*See, e.g.*, District Court Lawsuit
6 Doc. 137 (pre-bankruptcy Order resolving motions to dismiss, including Debtor Defendants’
7 motions to dismiss); Doc. 171 (pre-bankruptcy Order addressing Defendant Langley motion to
8 stay discovery); Doc. 337 (Order resolving multiple motions for summary judgment and motion
9 for stay of proceedings due to Debtor Defendants’ bankruptcy proceeding)]. Allowing the
10 Debtor Defendants at this late stage to try and claw back or reinvent their positions, to seek
11 discovery that Judge Snow has ruled the other similarly-situated Defendants were not entitled
12 to, or to urge legal arguments that Judge Snow has already rejected in the context of identically-
13 situated co-defendants smacks grossly of forum shopping. At a minimum it is wasteful,
14 duplicative and risks inconsistent outcomes on identical issues; and at worst it allows the Debtor
15 Defendants to use the bankruptcy courts to obtain an unfair “second bite at the apple”, with a
16 new judge, on multiple discovery and substantive issues. The latter prospect threatens the
17 foundations of due process owed to the Sweet Plaintiffs.

18 Given the positions set out in the Motion for Withdrawal, the Sweet Plaintiffs are highly
19 likely to succeed on having the reference of the adjudication and liquidation of the claims
20 subject to their Adversary Proceeding withdrawn and tried by the District Court. That means
21 that the need to ensure judicial efficiency, avoid waste and inconsistent rulings, discourage
22 forum shopping, and lay the procedural and substantive issues back with the District Court
23 judge who has already invested so much time and expertise in managing them provide
24 compelling reasons for this Court to stay any further proceedings on the Adversary Proceeding
25 until, at a minimum, the District Court rules on the Motion for Withdrawal. The law governing
26 the Bankruptcy Court’s authorities allow that sort of efficient, protective action.

II. The Bankruptcy Court has the Authority – Even *Sua Sponte* Authority – to Stay All Matters in the Adversary Proceeding.

The Sweet Plaintiffs advocate that the Court should enter an order staying the Adversary Proceeding pending the decision on the Motion for Withdrawal and abstaining from any further proceedings in that case until the withdrawal issue has been decided. The federal bankruptcy rules expressly imbue the Bankruptcy Court with stay powers in this circumstance. Rule 5011(c), Fed.R.Bankr.P. expressly provides that the bankruptcy courts shall not stay the administration of any proceeding before the bankruptcy judge just because a motion for withdrawal of the reference is filed, but then states “*except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion.*” (emphasis added). Relevant precedent affirms that bankruptcy courts are authorized to and do invoke stays under just such circumstances where motion for withdrawal of the reference are pending. *See, e.g., Miller v. Vigilant Ins. Co. (In re Eagle Enters.)*, 259 B.R. 83, 88-89 (Bankr. E.D. Pa. 2001); *Sharp v. SKPM Corp. (In re SK Foods, Ltd. P'ship)*, No. S-11-2369 LKK, 2011 U.S. Dist. LEXIS 103850, at *3 (E.D. Cal. Sep. 14, 2011) (indicating Bankruptcy Court granted stay of all proceedings in adversary proceeding pending the outcome of a motion to withdraw the reference, except for a single, pending Order to Show Cause matter); *see also, USACM Liquidating Tr. v. Compass USA SPE, LLC (In re USA Commer. Mortg. Co.)*, No. 2:14-cv-00455-RCJ-PAL, 2014 U.S. Dist. LEXIS 72663, at *8 (D. Nev. May 28, 2014) (“The Court will therefore grant the motion to withdraw the reference and stay the case pending the outcome of the interpleader action.”)

The stay power is discretionary, and is generally guided by Rule 5011(c), Fed.R.Bankr.P. *Fort v. Cilwa (In re Cilwa)*, Nos. 15-00263-HB, 15-80172-HB, 2016 Bankr. LEXIS 1817, at *11-12 (Bankr. D.S.C. Apr. 15, 2016); *In re City of Detroit, Mich.*, 498 B.R. 776, 781 (Bankr. E.D. Mich. 2013). However, under Rule 5011(c), when a motion for withdrawal of the reference has been filed, the Bankruptcy Court is authorized to consider whether to stay the adversary proceeding *sua sponte*. *In re Cliwa*, 2016 Bankr. LEXIS 1817, at *11-12 (“Although [movant] has not filed a motion to stay this adversary proceeding pending the outcome of his motion for withdrawal of the reference in District Court, the Court may

1 consider *sua sponte* whether to stay this proceeding.”) After all, “[a] court's power to stay
2 proceedings 'is incidental to the power inherent in every court to control the disposition of
3 causes on its docket with economy of time and effort for itself, for counsel and for litigants' . .
4 . [and] [s]everal courts have recognized that the power to stay may be invoked by the court *sua*
5 *sponte*.” *In re Pittsburgh Corning Corp.*, C/A No. 03-35592 JKF, 2012 U.S. Dist. LEXIS
6 86193, 2012 WL 2368388, at *3 (W.D. Pa. June 21, 2012) (citations omitted)).

7 The Court’s inherent powers to control the disposition of causes on its docket with
8 economy therefore allow the Court to consider the pending motion for stay relief to invoke a
9 request that the Bankruptcy Court stay active proceedings in the Adversary Proceeding, or to
10 simply *sua sponte* consider whether and how the Adversary Proceeding should be stayed
11 pending the decision on the Motion for Withdrawal.

12 **III. The Facts Here Meet All the Factors That Compel a Stay Under Rule 5011(c)**
13 **Considerations.**

14 “When determining whether an adversary proceeding should be stayed, the Court
15 considers the following: (1) the likelihood that the pending motion to withdraw will be granted
16 (i.e. likelihood of success on the merits); (2) that the movant will suffer irreparable harm if the
17 stay is denied; (3) that the non-movants will not be substantially harmed by the stay; and (4)
18 the public interest will be served by granting the stay.” *Fort v. Cilwa (In re Cilwa)*, 2016 Bankr.
19 LEXIS 1817, at *11-12 (citing *The Antioch Co.*, 435 B.R. at 497; *In re City of Detroit, Mich.*,
20 498 B.R. 776, 780 (Bankr. E.D. Mich. 2013) (analyzing the same factors). These discretionary
21 factors all may present different or individually compelling reasons in a particular case. For
22 example, the Bankruptcy Court in *Miller*, 259 B.R. at 88-89 was particularly encouraged to
23 grant a stay because the withdrawal, which appeared to be mandatory, seemed very likely to
24 occur, and because without a stay the party seeking withdrawal “would suffer harm in the form
25 of duplicative costs of litigating in this Court” and another, and the trustee and other party in
26 the adversary proceeding would sustain minimal harm by a stay as they would try the case in
27 either forum, and the trustee “has retained counsel for each action.”

1 The circumstances in *Miller* track well the circumstances here. The Motion for
2 Withdrawal presents a compelling argument for mandatory withdrawal, and an equally
3 compelling secondary argument for discretionary withdrawal. It is very likely that the
4 withdrawal will be granted. Moreover, even if it were not granted, under the law that allows
5 the Sweet Plaintiffs to pursue the discharged variants of their claims against the Debtor
6 Defendants in the District Court Lawsuit to enforce them against the Debtor Defendants'
7 insurers or indemnitors, substantially similar versions of the claims impacted by the Adversary
8 Proceeding will be tried in the District Court anyway, with Debtor Defendant Philip Mitchell
9 Brailsford as the central witness. He and his wife already have separate counsel in that action,
10 who have continued to represent them, including by attending all the recent depositions over
11 three weeks in October, 2019. The Debtor Defendants were active participants in the District
12 Court Lawsuit for well over a year before they filed for bankruptcy, they retained and filed
13 reports for experts, and they served and responded to discovery. They have a formal
14 indemnification agreement from the City of Mesa for any liability they incur in that action, and
15 they would have little justification for extensive discovery. Judge Snow has indicated in his
16 Order on August 2, 2019, at page 6 that if the parties agree that the bankruptcy proceedings of
17 the Brailsfords have terminated, they may conduct discovery regarding the claims against
18 Debtor Defendants, and that the parties "may additionally move for summary judgment as to
19 issues pertaining to him [Philip Mitchell Brailsford]." [District Court Lawsuit Doc.337, at 6].
20 Though the parties would have to agree on precisely the timing for that final discovery and
21 summary judgment practice, the District Court has indicated its willingness to fold it right back
22 into the pending case. And, that case is still not completely set for trial because there remains
23 a final deadline of February 7, 2020 for some limited, final dispositive argument briefing under
24 the District court's orders. [See District Court Lawsuit Doc. 372]. There would be no trouble
25 completing any remaining procedural steps to which the Debtor Defendants would be entitled
26 under the Federal Rules of Civil Procedure after the ruling on the Motion for Withdrawal, and
27 it makes no sense to try and wedge such matters onto this Court's plate when Judge Snow has
28 repeatedly dealt with those same discovery issues, scheduling deadlines, and substantive

1 summary judgment motions on highly overlapping claims already. A stay of the Adversary
2 Proceeding places no burden at all on the Debtor Defendants. Rather, it actually expedites
3 things for them by putting them back where they started before a judge intimately familiar with
4 the facts, claims, and discovery disputes in that matter.

5 On the other hand, to force the Sweet Plaintiffs to bifurcate the variants of their claims
6 against the Debtor Defendants and proceed toward trial on them in two different courts, and to
7 allow the Debtor Defendants to try and reinvent their positions, seek discovery that Judge Snow
8 has definitively disallowed, and assert substantive arguments that have failed to persuade Judge
9 Snow when coming from the Debtor Defendants and their similarly situated co-defendants in
10 the District Court Lawsuit, wreaks havoc and prejudice on the Sweet Plaintiffs. It takes a
11 simple, streamlined, nearly finished process in which they have invested incredible time and
12 effort and rips it into highly unmanageable and duplicative pieces with the risk now of
13 completely inconsistent rulings and outcomes. Given that sort of one-sided balance of
14 prejudicial concerns, this Court, like the Court in *Miller*, should exercise its discretion to stay
15 all matters in the Adversary Proceeding until, at a minimum, Judge Snow has ruled on the
16 pending Motion for Withdrawal.

17 The final piece of the stay puzzle is the public interest. There can be no question that
18 given our over-burdened courts, and the need for as much efficiency and consistency as possible
19 to cement the public trust in the federal judicial institutions, the Court must grant a stay. To
20 allow parallel, overlapping, and likely inconsistent and unnecessarily duplicative and expensive
21 pre-trial proceedings to go forward on the Adversary Proceeding could only undermine both
22 the real and perceived efficiency and reliability of the courts in this instance. Again, a stay is
23 critical for many reasons, and presents no downsides.

24 **IV. Conclusion.**

25 The Bankruptcy Court has authority under Rule 5011(c), Fed.R.Bankr.P., and stemming
26 from its inherent authority to control its own docket in the interests of efficiency, economy and
27 justice, to issue a stay of all matters in the Adversary Proceeding pending the outcome of the
28 District Court's consideration of the pending Motion for Withdrawal. All of the factors that the

1 Court may properly consider in exercising such discretion compel a stay here. The Court should
2 therefore immediately grant a stay of all proceedings in the Adversary Proceeding pending the
3 ruling by Judge Snow on the Motion for Withdrawal. The Court may order the Sweet Plaintiffs
4 to promptly advise this Court of Judge Snow's ruling, and further provide that the Sweet
5 Plaintiffs a/or the Debtor Defendants shall meet and confer within ten (10) days of that
6 notification concerning further orders of this Court that may be appropriate concerning the
7 Adversary Proceeding, and within another ten (10) days thereafter provide any further
8 motion(s) or stipulations advising the Court of the actions such parties request the Court take
9 given the ruling of the District Court.

10 RESPECTFULLY SUBMITTED this 13th of December, 2019.

11 BASKIN RICHARDS PLC

12 /s/ William A. Richards

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing to:

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